FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: January 14, 2002

SUBJECT: Supplemental Statement Of Reasons for MUR 4994

Attached is a copy of the Supplemental Statement Of Reasons for MUR 4994 signed by Commissioner Darryl R. Wold.

This was received in the Commission Secretary's Office on

Friday, January 11, 2002 at 3:44 p.m.

cc: Vincent J. Convery, Jr.
OGC Docket
Information Division
Press Office
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	**MUR 4994**
New York Senate 2000	)	
and Andrew Grossman, as treasurer, *et al.*	)	

SUPPLEMENTAL STATEMENT OF REASONS OF COMMISSIONER DARRYL R. WOLD

On September 25, 2001, the Commission voted to reject the recommendations of the General Counsel[1] that the Commission find reason to believe that a number of respondents named in the First General Counsel's Report violated various provisions of the Federal Election Campaign Act, and that the Commission approve discovery against those respondents.[2] The Commission then voted to take no further action and to close the file as to all respondents.[3] This Statement explains the reasons that I voted with other Commissioners to reject the General Counsel's recommendations to find reason to believe, and voted to take no further action against any respondents and close the file.

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[1] The First General Counsel's Report dated September 11, 2001 was signed by the Acting General Counsel at that time. When the Commission considered this matter on September 25, the Commission's newly-appointed General Counsel, Lawrence H. Norton, appeared before the Commission. For the sake of convenience, references in this Statement to the "General Counsel" or to "the General Counsel's recommendations" will be to either or both as appropriate in the context.

[2] The respondents that were the subject of this vote were those named in recommendations 1. through 8. in the First General Counsel's Report dated September 11, 2001, with the name of one treasurer corrected at the Commission meeting. The vote to reject the General Counsel's recommendations was 5-1, with Commissioner Thomas dissenting.

[3] The General Counsel recommended that the Commission not find reason to believe that some of the respondents identified in the complaint violated the Act. The Commission unanimously approved that recommendation.

I.

This matter arose out of a complaint filed by Common Cause and Democracy 21 on April 4, 2000, alleging that various candidates and party committees, some specifically identified in the complaint, either had violated or would be violating the provisions of the Federal Election Campaign Act that limit the source and amount of contributions that can be accepted by party committees and that party committees can make to candidates. The complaint is a repetitive mishmash of policy assertions, legal theories, hyperbole, speculation, and newspaper accounts. It requires careful reading to identify the legal theories that the complainants appear to rely on for the assertion of violations.[4] The Commission construes complaints liberally, however, on the understanding that they are often filed by persons who are not familiar with the specific legal requirements of the Act. Nevertheless, the Commission can act only on complaints that provide a sufficient factual basis for finding reason to believe that a violation has occurred.

The complaint is based primarily on a pattern of activity alleged to have been engaged in by a number of candidates and party committees: A joint fundraising committee was formed between a candidate and a party committee; the joint fundraising committee raised hard and soft money; the soft money and possibly part of the hard money was transferred to the participating party committee; and the party committee then either used that money for "issue ads" in support of the candidate's campaign or transferred that money to another party committee which did so. In addition, the complaint alleges one particular instance in which the content of a party-sponsored advertisement was coordinated with the candidate.

Based on these fact patterns, the complaint appears to assert three distinct legal theories as the basis for violations of the Act:

(1) That where funds are raised through joint fundraising activity between a party committee and a federal candidate, at least where the solicitation states in some manner that the proceeds will be used to benefit the candidate's election, all such funds are for the purpose of influencing an election for federal office and are therefore contributions, without regard to how they are subsequently used, and are therefore subject to the amount and source limitations of the Act (paragraphs 3, 4, 6, and 20, among others);

(2) That all advertisements paid for by a political party that promote a specifically identified federal candidate, or attack a federal candidate's opponent, constitute

[4] One could readily conclude that the complaint was designed as much to serve the complainants' interests in publicity for their policy positions as it was to bring the facts of alleged violations to the attention of the Commission. At the same time as the complaint was filed, the complainants held a news conference and issued a press release and statements disclosing the filing of the complaint with the Commission, and reiterating much of the contents of the complaint. The complainants also announced that they had sent a copy of the complaint to the United States Attorney General asking that the Justice Department's Campaign Finance Task Force investigate the matters alleged in the complaint. (See the web site for Common Cause at http://commoncause.org/publications/complaint/, for copies of these materials.)

expenditures under the Act, and the funds used for those expenditures are subject to the amount and source limitations of the Act (paragraphs 38 through 41); and

(3) That advertisements paid for by party committees, using funds from a joint fundraising committee with a federal candidate, were in fact coordinated with the candidate in one particular instance, and because of that coordination the cost of those advertisements constituted contributions to the candidate and were subject to the amount and source limitations of the Act (paragraph 31).[5]

The First General Counsel's Report did not address the first two theories, above, in recommending action on the complaint, but instead made recommendations only on the coordinated expenditures theory. I nevertheless address all three theories in this Statement because part of my reason for voting to close the file in this matter as to all respondents was that I rejected the first two theories of the complaint as a matter of law.

II.

My specific reasons for rejecting the General Counsel's recommendations to find reason to believe against some respondents, and to close the file as to all respondents on any legal theory reasonably raised by the complaint, are as follows.

A. Allegations Concerning All Respondents

Complainants' theory (1), that proceeds of joint fundraising between a party and a candidate are contributions, appears to apply to all respondents.

I would not find reason to believe against any respondent on this theory, however, because I do not agree with the theory of the complaint that all donations to a joint fundraising committee are necessarily "contributions" under the Act, even if the solicitation generally states that proceeds will be used to benefit the candidacy of a participating federal candidate. The Commission has long recognized that a variety of political party activity, including issue-oriented advertising that does not advocate the election or defeat of a particular federal candidate, has the mixed effect of influencing both federal and nonfederal candidates, and therefore a combination of hard and soft money may be used to pay for such activity, with the minimum portion that must be paid with hard money specified in the Commission's regulations. (See the Commission's

[5] This theory appears almost incidental to the complaint. The April 4, 2000 statement by complainant Democracy 21's president, Fred Wertheimer, released at the press conference to announce the filing of the complaint, mentioned the coordination alleged in the complaint between the Hillary Clinton for U.S. Senate Committee and the New York State Democratic Party, but then said "Nevertheless, such coordination is not a necessary component in order to find that the scheme being used to launder soft money into Senate races is illegal." (See statement available at http://commoncause.org/publications/complaint/.) The complaint did allege the facts of coordination, however, and those facts implicate the provisions of the Act.

detailed regulations on allocating expenditures for party activity between federal and non-federal accounts in 11 C.F.R. § 106.5; Advisory Opinion 1995-25, applying that theory and allocation requirement to a party's issue advertising in the absence of coordination with a candidate.) Whether the funds received to support that activity constitute contributions within the meaning of the Act depends on which side of the equation they are used -- moneys deposited in the party's federal account, from which at least the specified minimum portion of such activity must be paid, must comply with the source and amount limitations of the Act; moneys deposited in the party's non-federal account, from which the balance of the cost of such activity may be paid, may be unlimited in amount and accepted from some sources prohibited by the Act from making contributions. As long as funds received through joint fundraising are properly deposited in federal or non-federal accounts, and as long as payments for party activity are properly allocated between those accounts, there is no violation of the law by virtue of the source of those funds in joint fundraising activity.

The complaint essentially challenges the theory of the allocation regulations and their application to non-coordinated issue advertising by party committees where the source of those funds was in joint fundraising activity. The complaint does not appear to allege that the allocation regulations were not complied with. I therefore did not find any violation of the law to be alleged by the complaint under this theory.

Complainants' theory (2), that communications paid for by a political party and that mention a specific federal candidate are contributions, also appears to apply generally to all, or at least most of, the respondents.

This theory also appears to challenge the Commission's longstanding position, described above, that communications paid for by a political party, absent express advocacy and absent coordination, have the mixed effect of influencing both state and federal candidates, and that the cost of such communications may therefore be paid with a combination of federal and non-federal funds. Compared to theory (1), above, which reaches the same conclusion where the source of funds is joint fundraising, this theory appears to be a more frontal attack on the Commission's longstanding allocation rules, alleging a violation of the Act without regard to whether the funds were raised by a joint fundraising committee or by some other means.

Again, the complaint does not appear to allege that the allocation regulations were not complied with. I therefore did not find any violation of the law alleged by the complaint under this theory either.

B. Recommendations Concerning Respondents Who Coordinated Communications Between Party Committees and Clinton for Senate

The only specific factual allegation of coordinated expenditures in the complaint in this matter concerned a particular television advertisement allegedly coordinated

between Respondents Clinton for Senate Committee and the New York State Democratic Committee, using funds jointly raised through New York Senate 2000 and in part passed through the Democratic Senatorial Campaign Committee. The General Counsel recommended finding reason to believe that Clinton for Senate Committee, the New York State Democratic Committee, and the Democratic Senatorial Campaign Committee violated the Act in connection with the expenditures for that and an additional coordinated advertisement.[6]

The allegations of the complaint are clearly sufficient to support a finding of reason to believe that the television advertisement described in the complaint was coordinated at least between the New York State Democratic Committee, which paid for the ad, and the Clinton for Senate Committee. Specific, credible allegations of actual coordination concerning the content of the advertisement are set out in the complaint, and those allegations would be sufficient to constitute coordination under any reasonable understanding of that term as it is used to refer to expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" (2 U.S.C. § 441a(7)(B)(i)). No rule or advisory opinion of the Commission concerning coordination suggests that that advertisement would not have qualified as a coordinated expenditure within the plain meaning of the Act, and at the time the advertisement was run, no enforcement decision did so either.

I nevertheless voted against the General Counsel's recommendation to find reason to believe there were violations arising out of those coordinated expenditures, and to close the file. I did so for the same reason that I voted to close the file without pursuing violations arising out of expenditures apparently coordinated between a party committee and a candidate in another matter recently pending before the Commission, MUR 4538 (Alabama Republican Party, et al.). I briefly reiterate that reason.

Since the conclusion of the 1996 election cycle, the Commission has had before it a number of matters in which the General Counsel has recommended finding reason to believe that a party committee used impermissible funds and made a prohibited or excessive contribution to one of its candidates because the party committee coordinated spending for media advertisements with that candidate. In considering those matters, two Commissioners have in effect limited the cases in which they would find coordination between a party and a candidate to those in which the advertisement contained express advocacy, although they reached that position for different reasons.[7]

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[6] The additional advertisement described in the First General Counsel's Report, standing alone as a basis for finding reason to believe, would have the same deficiency as a basis for reason to believe as do the advertisements described in the First General Counsel's Report in the Ashcroft and Stabenow campaigns, discussed *infra*, because like them it was not mentioned in the complaint. The complaint, however, described in detail the coordination of one of the two advertisements that the General Counsel relied on for recommending finding reason to believe concerning the spending coordinated with Clinton for Senate.

[7] Commissioner Sandstrom has taken the position that there has been insufficient notice of the Commission's position concerning party media advertisements coordinated with candidates to meet due

That has left only four Commissioners who will consider non-express advocacy party-candidate coordination cases on the facts of coordination in the particular case -- and that means that unanimity is required among those four to find reason to believe in any particular case. The Commission's recent experience in that situation has shown that in at least some of those cases at least one of those four Commissioners -- and the identity of the particular Commissioner can vary -- has a different view of the facts and the application of the law to those facts than do the other Commissioners. That results in a failure to find reason to believe by the required four-vote majority, and the dismissal of the case. Taken as a whole, however, the results from those cases may appear to lack a consistent interpretation and application of the law, and the results may appear arbitrary.

In that light, I agreed in MUR 4538 (Alabama Republican Party, et al.) that it would be better to simply dismiss all such pending party-candidate coordination cases as a matter of prosecutorial discretion, rather than reach at best inconsistent results, and joined other Commissioners in voting to do so in that matter. Consistent with that position, I also voted to dismiss this matter concerning the alleged coordination between party committees and Clinton for Senate 2000.

C. Recommendations Concerning Respondents Who Coordinated Communications Between Party Committees and Ashcroft 2000 and Stabenow for U.S. Senate

The reason that I voted against finding reason to believe concerning coordinated expenditures between party committees and Clinton for Senate, explained above, also applies to the General Counsel's recommendations concerning coordinated expenditures between party committees and Ashcroft 2000 and Stabenow for U.S. Senate.

I had additional, independent bases, however, for voting against the General Counsel's recommendations concerning these respondents.

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process requirements for enforceability, at least where there is no express advocacy. See Commissioner Sandstrom's Statement of Reasons in MURs 4553 et al. concerning allegedly coordinated media advertisements in the 1996 major party presidential campaigns. Commissioner Smith has taken the position that express advocacy is a constitutionally-required element of coordination, and he will not find advertising to have been coordinated between a candidate and a publisher if it does not contain express advocacy. See Commissioner Smith's Statement for the Record in MUR 4624 (The Coalition et al.). For my part, I have not taken the position that express advocacy is a requisite element of a coordinated expenditure. I also do not feel that the Commission's position concerning expenditures coordinated between a party and its candidates has been so uncertain that it cannot be enforced for due process reasons. The provisions of the Act defining what is generally referred to as "coordination" as "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" is clear enough to be enforced on its own against activities clearly within that description, even though there may be other cases on the margin. (See 2 U.S.C. § 441a(a)(7).) I would be glad to join with my colleagues in more precisely defining the Commission's understanding of these terms, as the Commission has done in the case of expenditures coordinated between candidates and entities other than party committees (see 11 C.F.R. § 100.23) but that is not necessary for application of the statutory definition to activities clearly within it.

First, the complaint in this matter is insufficient as a basis for the General Counsel's recommendations concerning these respondents, because it did not allege any coordination as to particular advertising expenditures between these respondents. The complaint mentioned these respondents only as examples of joint fundraising committees, which it contended by the very name of the joint fundraising committee ("Ashcroft Victory Committee" and "Michigan Senate 2000" respectively) suggests that money raised "will be spent for the direct benefit of that Senate candidate" (Complaint, ¶¶ 18, 19, 20). The complaint thus appears to bring these respondents in only under theory (1), described above. As I explained in part I of this statement, I rejected that theory as a matter of law, and the First General Counsel's Report did not include that theory as a basis for finding reason to believe.

Indeed, the complaint could not have referred to the coordinated communications described in the First General Counsel's Report as the basis for finding reason to believe against these respondents on a coordination theory, because the complaint was filed in April, 2000, but the allegedly coordinated expenditures here were not made until sometime in September, 2000, when the advertisements were paid for and broadcast. No facts were alleged that would have served as a sufficient basis for believing that these respondents would engage in coordinated advertising in the future. As to coordinated expenditures by these respondents, therefore, the complaint was completely speculative and could not serve as the basis for a reason to believe finding.

The question remaining is whether there was any basis for the General Counsel to bring the later-occurring facts concerning the coordinated expenditures to the Commission. The First General Counsel's Report explains that the source of the information concerning these expenditures was an *ad hoc* review by the General Counsel's staff of campaign reports filed with the Commission by the respondents in question, and of various publications and other sources that provided the scripts for the ads that were run. There is, however, no authorization in the Act for that kind of *ad hoc* investigation to be conducted by the Commission, and thus it appears that a recommendation based solely on such an investigation would not properly be before the Commission for consideration.

The Act, in 2 U.S.C. § 437g(a)(2), authorizes the Commission to conduct an investigation only after finding reason to believe that a person has committed, or is about to commit, a violation of the law.[8] Subdivision (a)(2) also provides that the Commission may find reason to believe "upon receiving a complaint . . . or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities."

[8] The Act, in 2 U.S.C. § 438(b), also authorizes the Commission to conduct "audits and field investigations" of committees, which in one sense are "investigations," but also provides that such audits and field investigations may be conducted only of those committees whose reports do not meet pre-established compliance thresholds. That procedure was not involved in this matter.

In Directive No. 6, Handling of Internally Generated Matters, adopted by the Commission on April 21, 1978, the Commission considered how that phrase, "in the normal course of carrying out its supervisory duties," should be interpreted. The Commission noted the absence of guidance in the legislative history that would shed light on the meaning of that phrase, so in Directive 6 set out detailed guidelines for such "internally generated" matters. These guidelines permit internally generated matters to be considered by the Commission in only limited circumstances. Only two of those circumstances, described in part II, paragraphs C and D of Directive 6, could apply here.

Paragraph C permits consideration of matters generated pursuant to a Commission-authorized non-routine review of reports or other documents. That provision also provides, however, that: "No non-routine reviews of reports or other documents shall be conducted by Commission staff members without specific prior approval of the Commission." Prior approval was not obtained here. Paragraph (C) further provides that the Commission can invoke its procedures only as "a project based upon a uniform policy of review of a particular category of candidates or other reporting entities." The *ad hoc* review of advertising by party committees referred to for other purposes in this complaint would not qualify as "a uniform policy of review of a particular category" of committees in any event.

Paragraph (D) provides that "News articles and similar published accounts of possible violations may, under certain conditions, constitute the source of internally generated MURs," and sets out additional considerations. This provision, however, likewise cannot validate the investigation conducted by the Office of General Counsel in this matter. It appears to contemplate only a news article or other report that itself alleges a violation, or sets out facts that on their face would constitute a violation, and which comes to the attention of the Commission staff from some external source. In light of the specific prohibition in provision (C) against *ad hoc* searches for evidence of violations, provision (D) cannot be read to authorize any such search of news accounts or other records undertaken by the Office of General Counsel on its own volition.

In summary, it appears to me that the investigation concerning coordination by these respondents was not permitted by the Act or by the Commission's interpretation of the Act in its guidelines in Directive No. 6, and the General Counsel's recommendations based on that investigation were therefore not properly before the Commission.

D. Recommendations Concerning Reporting Violations

The complaint inexplicably did not allege any reporting violations. The General Counsel, however, recommended that the Commission find reason to believe that there were reporting violations, in those instances where the General Counsel also recommended finding reason to believe there were underlying violations arising out of coordinated expenditures. I voted against that recommendation in those instances for the same reasons that I voted against those underlying violations, which I explained above. I

of course would not support finding reason to believe there were reporting violations arising out of any other theory advanced by the complaint, for the same reasons that I did not find that there were underlying violations on those theories, as also discussed above.

Dated: January 11, 2002

Darryl R. Wold
Commissioner